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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/814,401	03/22/2001	Mark D. Einziger	1932/0H835	3826

7590 04/16/2008
Stephen B Shear
Church & Dwight Co Inc
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EXAMINER

SHEIKH, HUMERA N

ART UNIT	PAPER NUMBER
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1618

MAIL DATE	DELIVERY MODE
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04/16/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 09/814,401	Applicant(s) EINZIGER ET AL.	
	Examiner Humera N. Sheikh	Art Unit 1618	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 December 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-25 is/are pending in the application.
- 4a) Of the above claim(s) 1,2 and 17-22 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 3-16 and 23-25 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Status of the Application

Receipt of the Response to Non-Final Office Action, the Amendment and Applicant's Arguments/Remarks, all filed 12/26/07 is acknowledged.

Applicant has overcome the following rejection(s) by virtue of the amendment and/or persuasive remarks: (1) The rejection of claims 3-16 and 23-25 under 35 U.S.C. 112, second paragraph has been withdrawn.

Claims 3-16 and 23-25 are being examined in this action. Claims 3 and 14 have been amended herein. Claims 1, 2 and 17-22 have previously been withdrawn. Claims 3-16 and 23-25 remain rejected.

* * * * *

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 3-16 and 23-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Winston (U.S. Pat. No. 4,623,536).

The Winston *et al.* patent teaches a toothpaste composition containing at 60% sodium bicarbonate particles having particle size of less than 25 microns. Conventional adjuvants such as humectants, thickening agents, fluoridating agents, flavors, and sweeteners may also be added to the disclosed compositions (See Abstract). Water may be included in amounts ranging from about 0 to 25% by weight (see column 4, Lines 12-17).

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Although the prior art is silent with respect surface area, bulk density, and Zeta potential, it is the position of the examiner that patentability cannot be imparted unto the instant claims through the recitation of such functional language without further proof of unexpected results that arise therefrom. As all other limitations of the instant claims have been met through the broad disclosure of the prior art, it will be assumed that the compositions of the prior art will have the same properties recited in the functional language described above. With regard to Claims 14-16, the examiner interprets these claims as being directed towards a future intended use of the invention of Claim 3. As such, these claims do not hold patentable weight as Claim 3 has been shown to be obvious in view of the prior art. Therefore, the instantly claimed invention is *prima facie* obvious.

* * * * *

Response to Arguments

Applicant's arguments filed 12/26/07 have been fully considered and were found to be partially persuasive.

▪ **Rejection under 35 U.S.C. 112, second paragraph:**

Applicant argued, "Claim 3 of the application has been amended (along with claim 14) to cancel the term 'flowable' and thereby obviate the rejection of the claims."

This argument has been fully considered and was found persuasive by virtue of the cancellation of the term "flowable". Accordingly, the rejection of claims 3-16 and 23-25 under 35 U.S.C. 112, second paragraph has been withdrawn.

▪ **Rejection under 35 U.S.C. 103(a) over Winston (USPN 4,623,536):**

Applicant argued, "Nowhere in the reference is there mention of the density of the toothpaste composition. The toothpaste of the reference requires a dispensing pressure in order to move the composition out of the toothpaste dispenser. One of ordinary skill in the art would therefore recognize that the reference formulation is not a slurry. A slurry is inherently flowable and would be expected to flow out of the orifice."

Applicant's arguments have been fully considered, but were not deemed persuasive. Admittedly, while the Winston reference does not teach the instant density as presently claimed, it remains the position of the Examiner that Applicants have not demonstrated any unusual or unexpected results which accrue from the particular densities claimed herein. Moreover, the reference vividly recognizes and teaches a toothpaste formulation having the same ingredients as instantly claimed by Applicant. The art teaches a toothpaste containing at least 60% sodium bicarbonate particles as the sole abrasive whereby at least 30% of the sodium bicarbonate has a particle size of less than 25 microns. These parameters clearly meet and fall within the parameter limitations claimed by Applicant. The argument that the "reference requires a dispensing pressure" was not persuasive since the fact that the reference may require pressure to some extent, does not, in any way, render it less effective for its' intended use.

Applicant argued, "The largest amount of water is only about 18%".

This argument was not deemed persuasive. Generally, differences in concentration will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by

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routine experimentation.” *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). In this instance, the prior art, as noted by Applicant, teaches about 18% water which would read on the “about 20%” presently claimed. Moreover, the determination of suitable amounts and/or ranges is within the level of one of ordinary skill in the art via manipulative experimentation, to obtain optimal results, as these are variable parameters attainable within the art. The amount of water disclosed by the prior art would render the composition 'flowable'.

Applicant argued, “Furthermore, a toothpaste composition typically remains on the toothbrush employed by the user until brushing commences. A slurry because it is inherently flowable would not be used for this purpose.”

The Examiner was not persuaded by this argument. The toothpaste formulation of Winston falls within the category of products instantly claimed, as in instant claim 23, and thus is also suitable for the intended purpose.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

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however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

--No claims are allowed at this time.

Correspondence

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Humera N. Sheikh whose telephone number is (571) 272-0604. The examiner can normally be reached on Monday, Tuesday, Thursday and Friday during regular business hours.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Hartley, can be reached on (571) 272-0616. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have any questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Humera N. Sheikh/

Primary Examiner, Art Unit 1618

hns

April 14, 2008

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